# STATE OF MICHIGAN

# COURT OF APPEALS

WOODLAND OIL COMPANY,

Plaintiff-Appellant,

v

OTWELL MAWBY, P.C.,

Defendant-Appellee.

UNPUBLISHED
February 22, 2005

No. 249246
Grand Traverse Circuit Court
LC No. 01-021950-NZ

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff Woodland Oil Company appeals as of right from a judgment entered in favor of defendant Otwell Mawby, P.C. Plaintiff challenges the trial court's grant of a directed verdict in favor of defendant on plaintiff's claims for breach of contract and innocent misrepresentation. We affirm in part, reverse in part, and remand for further proceedings.

In 1990, plaintiff engaged defendant to perform environmental studies and remediation on a site located on Garfield Road that had been contaminated by gasoline leaking from underground storage tanks (UST's) on the site. The parties do not dispute that defendant performed various environmental studies and remediation activities on the site for almost ten years. In 2000, plaintiff retained another environmental consultant to complete the remediation work and submit a final report to the Michigan Department of Environmental Quality (MDEQ).[1] The second consultant allegedly discovered a number of problems with defendant's site evaluation and remediation efforts, which would prevent the site from being closed. Plaintiff sued defendant in December 2001, claiming that defendant had failed to adequately assess and recommend proper methods to clean up and close the site. Plaintiff also alleged that had defendant performed in a timely manner, plaintiff would have been able have its clean-up costs covered by the Michigan Underground Storage Tank Financial Assurance (MUSTFA) fund or by

[1] At the time the relationship between the parties began, the Michigan Department of Natural Resources (MDNR) was the state agency charged with environmental enforcement. Later, MDEQ was created and became the State's primary environmental enforcement agency. To avoid confusion, MDEQ rather than MDNR will be used throughout this opinion.

private insurance. Plaintiff asserts that, by the time plaintiff discovered defendant's errors, MUSTFA and plaintiff's insurance company were insolvent, and plaintiff was required to bear the total costs of remediation.

Plaintiff's complaint comprised counts of professional negligence, breach of contract, innocent misrepresentation, and promissory estoppel. After the close of plaintiff's proofs, the trial court directed a verdict in favor of defendant on the breach of contract, innocent misrepresentation, and promissory estoppel claims. The jury rendered a verdict in favor of defendant on the professional malpractice claim.

Plaintiff first argues that the trial court erred in directing a verdict in favor of defendant on its breach of contract claim. We disagree.

We review rulings on directed verdict motions de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing a trial court's denial of a motion for a directed verdict, we examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). Accordingly, the threshold for obtaining a directed verdict is high." *Hord v Environmental Research Inst of Michigan (After Remand)*, 463 Mich 399, 410; 617 NW2d 543 (2000).

Many disputes over whether a claim should be characterized as breach of contract or professional negligence arise in the context of the applicable statutes of limitation, e.g., where a claim has been brought after the limitations period for malpractice but before the period for contract claims has ended. Although the statute of limitations is not in issue here, the analysis in these cases is instructive.

The gravamen of an action is determined by reading the claim as a whole. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993). The type of interest allegedly harmed is the focal point in determining which cause of action (and therefore which limitations period) will apply. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). "Where the same set of facts can support either of two distinct actions, the applicable limitations period is the one controlling the theory actually pled." *Wilkerson v Carlo*, 101 Mich App 629, 631-632; 300 NW2d 658 (1980). Thus, this Court will "look beyond procedural labels to see exactly what a party's complaint is before deciding whether it should be barred." *Stringer v Bd of Trustees of Edward W Sparrow Hosp*, 62 Mich App 696, 699; 233 NW2d 698 (1975).

An action based on the negligent provision of professional services is a malpractice action, whether the action is for damages to a person or property or damages only to financial expectations. *Local 1064, RWDSU v Ernst & Young*, 449 Mich 322, 326-328; 535 NW2d 187 (1995). "[A] malpractice action is predicated upon the failure to exercise the requisite skill, whereas a contract action is based upon the professional's failure to perform '"a special agreement."'" *Brownwell v Garber*, 199 Mich App 519, 524; 503 NW2d 81 (1993).

Plaintiff argues that in addition to defendant's implied contract to perform environmental services in a competent and professional manner, defendant made a "special agreement" to completely delineate the horizontal and vertical extent of the contamination at the Garfield site. Plaintiff relies on three pieces of evidence: (1) a letter dated December 4, 1989, from MDEQ to

plaintiff requiring that it "[c]onduct a hydrogeological investigation to determine the vertical and horizontal extent of groundwater contamination;" (2) a letter to plaintiff from MDEQ dated February 2, 1990, which requires plaintiff to submit a site investigation work plan "for determining the extent of the contamination;" and, (3) a letter dated February 11, 1990, from defendant to plaintiff, referencing defendant's proposed work plan to clean up the site to "satisfy DNR requirements for a site investigation."

The existence of a proposed work plan does not demonstrate that the work plan was ever approved by plaintiff. Indeed, plaintiff's former CEO, Rick Scriber, admitted that defendant's work plan was altered by agreement between plaintiff and MDEQ and that the work plan was implemented in a piecemeal fashion depending on the company's cash flow. Most notably, Scriber testified that he had made the decision to stop the work involved in delineating the contamination because he felt it was more cost effective to begin clean-up efforts. Furthermore, Scriber testified that, based on the results of subsequent tests, defendant's remediation methods were successful in reducing the contamination in the areas where defendant was authorized to work. Plaintiff's other documents are progress reports which, like the work plan, do not create a special agreement to perform a particular act.

Plaintiff correctly argues that the lower court erred by relying solely on the fact that plaintiff could not show that defendant had ever warranted that it would fully delineate the extent of the contamination. The requisite "special agreement" for an action for breach need not be a warranty of a particular outcome. See e.g., *Stewart v Rudner*, 349 Mich 459; 84 NW2d 816 (1957) (where a physician was found liable for breach of a special agreement to perform a cesarean section on a patient, but had not warranted a particular outcome). Nevertheless, plaintiff failed to show that there was any special agreement at all regarding the type or extent of defendant's professional services.

Without evidence of a special agreement between the parties, it is clear the crux of the first two counts of plaintiff's complaint was not that defendant completely failed to perform delineation of the contamination on the Garfield site, but that defendant failed to do so adequately and with the requisite due care. The lower court therefore did not err in finding plaintiff's breach of contract claim to be duplicative of its professional negligence claim, and, thus, did not err by granting a directed verdict in favor of defendant on the breach of contract claim.

Plaintiff next argues that the trial court erred in dismissing its claim for innocent misrepresentation. We agree in part.

> "A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a *fraudulent purpose* or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered

> as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. *Id*. at 118. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. *Id*. at 117. Finally, in order to prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract." [*M&D, Inc v McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998) (emphasis in original).]

At trial, plaintiff's expert testified that as of 2000, the extent of the contamination at the Garfield site was still not fully delineated, despite the fact that defendant had submitted reports in 1994 and 1995 stating that delineation was complete. Plaintiff also presented a letter it received from defendant, stating that it had "delineated the horizontal and vertical extent of the Tire Factory/Woodland Oil Company plume." CEO Rick Scriber testified that he always relied on defendant's professional judgment with respect to the environmental work to be done at the Garfield site and that, as far as he could remember, defendant never recommended placing monitoring wells off-site. Scriber also testified that his understanding of defendant's corrective action plan from May 1995, was that the plan would comply with the MDEQ's requirements to clean up the site and bring it to closure. Finally, Scriber testified that, had he known that the installation of the soil vapor extraction and air sparging (SVE/AS) system would not result in the closure of the property, he would not have authorized the installation and operation of the system.

We find that plaintiff created a genuine issue of material fact on part of its innocent misrepresentation claim. Plaintiff presented evidence of a statement made by defendant regarding the status of the delineation at the site. According to plaintiff's expert, this statement was false at the time it was made. Plaintiff also presented evidence that it relied on defendant's professional judgment and that it had relied on plaintiff's recommendation to install the SVE/AS system.

As previously stated, however, a claim for innocent misrepresentation also requires that the injury suffered by the plaintiff inure to the benefit of the defendant. Michigan case law provides that the loss of the deceived inures to the benefit of the party making the misrepresentation only when "the defendant obtained what the false representations caused the plaintiff to lose." *Aldrich v Scribner*, 154 Mich 23, 28; 117 NW 581 (1908). In *Riddle v Lacey & Jones*, 135 Mich App 241, 246; 351 NW2d 916 (1984), this Court held that the damages claimed, i.e., the loss of the plaintiff's claim against a non-party or the loss of life insurance benefits, did not inure to the benefit of the defendant lawyer who received a fee for his services regardless of whether the plaintiff was ever paid. Thus, the defendant must be the recipient of the plaintiff's *actual* losses.

Here, plaintiff hired defendant to determine the full extent of the contamination and to clean up that area. Plaintiff's alleged damages included those costs necessary to fully delineate the area of contamination and to clean up the property. Presumably, defendant only charged plaintiff for the costs to clean up the area of contamination originally delineated by defendant. There is also no dispute that defendant cleaned up the area it had designated as requiring such work. Evidence presented at trial by plaintiff demonstrated that the area of contamination was not fully delineated, and plaintiff had to hire another company to delineate the full extent of the

contamination and to complete the additional work necessary to bring the property to closure. Therefore, in agreeing to fully delineate the area of the contamination, defendant received the benefit of remuneration for delineating the full extent of the contamination, although it only partially completed this task. However, because defendant was not paid to clean up the additional area of contamination, it received no benefit from the extra costs spent in cleaning up the entire area of contamination. In other words, those damages claimed by plaintiff consisting of the extra costs necessary to clean up the remaining contamination did not inure to the benefit of defendant, and cannot be included as damages, because defendant never promised that the area it did not know about would be cleaned. Accordingly, plaintiff's damages are limited to those costs incurred to fully delineate the vertical and horizontal extent of the remaining contamination of the property or the costs paid to defendant for the errant delineation, whichever is less, but do not include those costs incurred for the additional clean-up of the site.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio